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IN THE

SUPREME COURT OF THE UNITED STATES

BEEHIVE TELEPHONE COMPANY, INC., and
BEEHIVE TELEPHONE CO., INC. NEVADA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, Beehive Telephone Company, Inc. and Beehive Telephone Co. Inc. Nevada (collectively "Beehive") submit this supplemental brief to call this Court's attention to the decision of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") in *Anastasoff v. United States*, No. 99-3917EM, 2000 WL 1182813 (8th Cir. Aug. 22, 2000) (App. A-1).

STATEMENT

In *Anastasoff*, a panel of the Eighth Circuit ruled that its "unpublished decisions" must be recognized and applied as binding precedent. The Eighth Circuit declared unconstitutional that portion of 8th Circuit Rule 28A(i), which provides that "[u]npublished opinions are not precedent and parties generally should not cite them." As the court stated:

> Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. . . . This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.

App. A-3-4.

The Eighth Circuit found this "doctrine of precedent" to be a limitation on the judicial power conferred on the courts by Article III of the Constitution. Rule 28A(i) exceeded that limitation by giving the court the power to determine which judicial decisions will bind it and which will not. The rule was struck down insofar as it would allow the court to avoid the precedential effect of its prior decisions. *See id.* A-15.

ARGUMENT

Beehive challenges Rule 36(b) of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") as it was applied in this case to mask the unconstitutional denial of Beehive's right to judicial review. *See* Pet. 15-19. D.C. Cir. Rule 36(b) is also unconstitutional insofar as it expands the judicial power beyond the bounds of Article III as found by the Eighth Circuit in *Anastasoff.*

D.C. Cir. Rule 36(b) authorizes the D.C. Circuit to "dispense with published opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate." Pet. App. 47a. Like the unpublished opinions of the Eighth Circuit, the unpublished orders or judgments of the D.C. Circuit may not be cited as precedent. *See* D.C. CIR. R. 28(c) (App. A-17). By permitting the court to dispense with publication, D.C. Cir. Rule 36(b) gives the court the discretion to determine which of its decisions will bind it. Consequently, Rule 36(b) suffers the same constitutional infirmity found in 8th Cir. Rule 28A(i). However, Rule 36(b) has a pernicious effect beyond that of the rule struck down in *Anastasoff.*

In addition to affording the court the discretion to determine whether its action will be a binding precedent *in futuro,* Rule 36(b) invites the D.C. Circuit to depart from existing precedent by allowing the court to dispense with a statement of its reasons. As Judge Arnold noted prior to authoring the *Anastasoff* opinion, judges wishing to reject a precedent for some extraneous reason "can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser." Richard S. Arnold, *Unpublished Opinions: A Comment,* 1 J. APP. PRAC. & PROCESS 219, 223 (1999). Although

Judge Arnold did not state that judges actually use that device, the present case testifies to the unfortunate fact that abbreviated dispositions under Rule 36(b) enable the D.C. Circuit to disregard precedent and to treat similar cases differently. Witness the refusal of the D.C. Circuit to apply its "intent-to-appeal" test announced in *Southwestern Bell Tel. Co. v. FCC*, 180 F.3d 307, 313-14 (D.C. Cir. 1999) to determine the sufficiency of Beehive's petition for review in the case below.

Beehive and the Federal Communications Commission ("FCC") both recognized *Southwestern Bell* as the controlling precedent. *See* Pet. 7-8. Both parties urged the court to apply the intent-to-appeal test. *See id.* 17. Nevertheless, the court in *Beehive* declined to abide by its precedent. It dismissed Beehive's petition for review without explanation, merely citing a prior decision not involving the *Southwestern Bell* test. *See Beehive Tel. Co., Inc. v. FCC*, No. 98-1467, 1999 WL 1006310 (D.C. Cir. Oct. 28, 1999) (per curiam) (Pet. App. 32a-33a).[1]

Beehive's treatment below shows how D.C. Cir. Rule 36(b) serves to defeat the doctrine of precedent. On

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[1] When it waived its right to file a response to the petition in this case, the Government provided the Court with the opinion in *Beehive Tel. Co., Inc. v. FCC*, 180 F.3d 314 (D.C. Cir. 1999) ("*Beehive I*"). Like Beehive, the Government assumed that the *Beehive* panel was referring to *Beehive I*. However, while it was decided on the same day as *Southwestern Bell*, *Beehive I* did not involve the intent-to-appeal test. Moreover, adherence to *Southwestern Bell* would have required an examination of Beehive's petition for review and its subsequent filings in this particular case. *See* 180 F.3d at 313. Even if Beehive's intent to appeal were determined in *Beehive I*, that determination would have little precedential significance with respect to Beehive's intention as manifested by its submissions in this case.

October 15, 1999, the *Beehive* panel, on its own motion, ordered that the case be considered and decided on the briefs. *See* App. A-19. Six days later, two members of the *Beehive* panel (Judges Wald and Randolph) served on the three-judge panel of the D.C. Circuit that applied the *Southwestern Bell* intent-to-appeal test in the unpublished memorandum accompanying its judgment in *Isley v. Executive Office for the United States Attorneys*, No. 98-5098, 1999 WL 1021934 (D.C. Cir. Oct. 21, 1999) (per curiam) (App. A-20). The panel in *Isley* held that the appeal in the case encompassed orders of the trial court that were not referenced in the notice of appeal. The panel looked beyond the notice of appeal and found an intent to appeal the orders at issue manifested in the appellant's motion for appointment of counsel. *See* App. A-24-26.

Just one week after *Isley* was decided, the *Beehive* panel (including Judges Wald and Randolph) concluded that the issue of whether Beehive's petition for review encompassed both of the FCC's orders below "occasion[ed] no need for a published decision" under Rule 36(b). Pet. App. 32a. It summarily dismissed Beehive's petition for review (and declined to accept Beehive's supplemental brief addressing *Southwestern Bell* as controlling precedent). *See* Pet. 8; Pet. App. 33a. As shown by its citation of "Beehive Telephone Co., Inc. v. FCC (D.C. Cir. 1999)," the panel acted without regard to the *Southwestern Bell* test.[2] It apparently concluded that Rule 36(b) allowed it to depart from *Southwestern Bell*, and to act contrary to what was done just one week before in *Isley*, without stating its reasons or distinguishing the cases.

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[2] *See supra* note 1.

That the D.C. Circuit employed Rule 36(b) to treat similar cases differently is evidenced further by decisions the court made during the four months it considered Beehive's petitions for a rehearing of this case. In those four months, the D.C. Circuit published five opinions that applied the *Southwestern Bell* test to determine whether an appeal encompassed an agency order not designated in the petition for review or notice of appeal. *See* Pet. 17-18. Nevertheless, both the court en banc and the *Beehive* panel refused to revisit Beehive's case under *Southwestern Bell* or to explain why the case was dismissed. *See id.* 8-9.

Rule 36(b) allowed the court in *Beehive* to disregard the doctrine of precedent and the "most basic principle of jurisprudence" that judges "must act alike in all cases of like nature." *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). To paraphrase the analogy used in *Anastasoff*, the D.C. Circuit said to Beehive: "We may have decided this question the opposite way last week, but this does not bind us today, and, what's more, you cannot even tell what we did today because we won't tell you." *See* App. A-14. And, as the Eighth Circuit explained, "such a statement exceeds the judicial power, which is based on reason, not *fiat*." *Id.*

To summarize, Rule 36(b) violates Article III in two basic ways. First, the rule empowers the D.C. Circuit to determine which judicial decisions will bind it. Second, by allowing decisions by fiat, the rule allows the D.C. Circuit to dispose of cases in a manner unfathomable to the litigants, the bar, and ultimately to this Court. Either way, Rule 36(b) is wholly inconsistent with the doctrine of precedent that limits the power of Article III courts. This Court should hold that all decisions of the courts of appeal must have precedential effect, whether

published or not, and be accompanied at least by a brief statement of the court's reasoning.

Finally, it has long been argued that rules such as Rule 36(b) "reduce judicial accountability" and "allow difficult issues to be swept under the carpet." *National Classification Comm. v. United States,* 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J., concurring). It has been suggested that, as a practical matter, parties have little chance of prevailing on a petition for rehearing en banc in the D.C. Circuit, or on a petition for certiorari in this Court, when review is sought of an unpublished decision with "no precedential effect and no opinion to highlight the issues and reasoning of the court." *Id.* at 174. That proved true when Beehive petitioned the D.C. Circuit to rehear this case en banc. *See* Pet. App. 36a. We trust that it will be otherwise in this Court.

CONCLUSION

Based upon the foregoing, Beehive's petition for a writ of certiorari should be granted and D.C. Circuit Rule 36(b) should be declared unconstitutional insofar as it allows the D.C. Circuit to depart from the law set out in its prior decisions without any statement of the reasons to differentiate the cases.

Respectfully submitted,

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APPENDIX AA

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 99-3917EM

FAYE ANASTASOFF,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 8, 2000
Filed: August 22, 2000

Before RICHARD S. ARNOLD and HEANEY, Circuit Judges, and MAGNUSON,[1] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Faye Anastasoff seeks a refund of overpaid federal income tax. On April 13, 1996, Ms. Anastasoff mailed her refund claim to the Internal Revenue Service for

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[1] The Hon. Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

taxes paid on April 15, 1993. The Service denied her claim under 26 U.S.C. §6511(b), which limits refunds to taxes paid in the three years prior to the filing of a claim. Although her claim was mailed within this period, it was received and filed on April 16, 1996, there years and one day after she overpaid her taxes, one day late. In many cases, "the Mailbox Rule," 26 U.S.C. §7502, saves claims like Ms. Anastasoff's that would have been timely if received when mailed; they are deemed received when postmarked. But §7502 applies only to claims that are untimely, and the parties agree that under 26 U.S.C. §6511(a), which measures the timeliness of the refund claim itself, her claim was received on time. The issue then is whether §7502 can be applied, for the purposes of §6511(b)'s three-year refund limitation, to a claim that was timely under §6511(a). The District Court[2] held that §7502 could not apply to any part of a timely claim, and granted judgment for the Service. On appeal, Ms. Anastasoff argues that §7502 should apply whenever necessary to fulfill its remedial purpose, i.e., to save taxpayers from the vagaries of the postal system, even when only part of the claim is untimely. We affirm the judgment of the District Court.

I.

We rejected precisely the same legal argument in *Christie v. United States*, No. 91-2375MN (8th Cir.Mar. 20, 1992) (per curiam) (unpublished). In *Christie*, as here, we considered a refund claim mailed just prior to §6511(b)'s three-year bar and received just after. Like Ms. Anastasoff, the *Christie* taxpayers argued that §7502 should operate regardless of the claim's timeliness under §6511(a) to save their claim under §6511(b). We held

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[2]The Hon. Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

that even if §7502 could apply to a timely claim, it would not help in this situation: If §7502 were applied to the claim, it would be deemed received before the return. But §6511(a) provides that a claim must be submitted within two years of overpayment if no return has yet been filed–not three years. In other words, to save the claim under §6511(b) only makes it untimely under §6511(a). Ms. Anastasoff does not attempt to distinguish *Christie*. She does argue that a relevant regulation was not cited in *Christie*, but the reasoning of the *Christie* opinion is squarely inconsistent with the effect taxpayer desires to attribute to the regulation.

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the "judicial."

The Rule provides:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. . . .

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases

to similarly situated parties. *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 544 (1991); *Cohens v. Virginia,* 6 Wheat. 264, 399 (1821). These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution.[3] Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional. That rule does not, therefore, free us from our duty to follow this Court's decision in *Christie.*

II.

The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. Morton J. Horwitz, *The Transformation of American Law: 1780-1860* 8-9 (1977); J. H. Baker, *An Introduction to English Legal History* 227 (1990); Sir William Holdsworth, *Case Law,* 50 L.Q.R. 180 (1934). See, *e.g.,* 1 Sir William W. Blackstone, *Commentaries on the Laws of England* *69 (1765) ("it is an established rule to abide by former precedents"). To the jurists of the late eighteenth century (and thus by and large to the Framers),[4] the doctrine

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[3] "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1, cl. 1.

[4] Lawyers made up majorities of the Continental Congress, the signers of the Declaration of Independence, and the Framers of the Constitution. Perry Miller, *The Legal Mind in America* 16 (1962).

seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law.[5] In addition, the Framers had inherited a very favorable view of precedent from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government.[6] In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.

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[5]James Wilson suggested that the doctrine of precedent was brought to England by the Romans. 1 *The Works of James Wilson* 343 (1967). Chancellor Kent traced it "from the earliest periods of English history." James Kent, *Commentaries on American Law* 473-78 (12th ed. 1873). Blackstone found it "even so early as the conquest." 1 William Blackstone, *Commentaries* *69. Before them, in *Slade v. Morley*, Sir Edward Coke suggested simply that "precedents have always been respected . . . ." 4 Co. Rep. 91, 76 Eng. Rep. 1074 (K.B. 1602), reprinted in *Sources of English Legal History: Private Law to 1750* 428 (1986).

[6]Coke's struggle against the tyranny of the Stuarts, which the Framers identified with their own against King George, made him the legal authority most admired and most often cited by American patriots. Bernard Bailyn, *The Ideological Origins of the American Revolution* 30 (1967). Coke used precedent, and emphasized it to a greater degree than his predecessors, because it was his main weapon in the fight for the independence of the judiciary and limits on the king's prerogative rights. See Harold J. Berman and Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 450 (1996); J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* 46 (1987). By contrast, the only criticism of the doctrine of precedent was associated with Thomas Hobbes, who regarded the authority of precedent as an affront to the absolute power of the Sovereign. See Thomas Hobbes, *Leviathan* 323-26 (Penguin ed. 1985).

Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds.[7] By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself.[8] As Blackstone defined it, each exercise of the "judicial power" requires judges "to determine the law" arising upon the facts of the case. 3 Blackstone, *Commentaries* *25. "To determine the law" meant not only choosing the appropriate legal principle but also expounding and interpreting it, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule. . . ." 1 *Commentaries* *69.[9] In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges "to determine law" in each case, a judge is "sworn to deter-

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[7] See, *e.g.*, Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 595-602 (1987) (noting that the authority of precedent is commonly supported by arguments: (1) from fundamental fairness, i.e., that like cases should be treated alike; (2) from the need for predictability; and (3) as an aid to judicial decision-making, to prevent unnecessary reconsideration of established matters).

[8] Blackstone's great influence on the Framers' understanding of law is a familiar fact. See *Schick v. United States*, 195 U.S. 65, 69 (1904) ("At the time of the adoption of the Federal Constitution, it [Blackstone's work] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it."); Daniel Boorstin, *The Mysterious Science of Law* 265 (1941).

[9] This need not be done by way of a reported opinion. The record of the judicial proceedings and decision alone is sufficient evidence of the legal principles necessary to support the decision to provide "light or assistance" when "any critical question arises." 1 Blackstone, *Commentaries* *69.

mine, not according to his own judgements, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old." *Id.* The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "best and most authoritative" guide of what the law is, the judicial power is limited by them. *Id.* The derivation of precedential authority from the law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale. See 4 E. Coke, *Institutes of the Laws of England* 138 (1642) (a prior judicial decision on point is sufficient authority on a question of law because "a judicial decision is to the same extent a declaration of the law."); 1 Coke, *Institutes* 51 (1642) ("[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."); Sir Matthew Hale, *The History of The Common Law of England* 44-45 (Univ. of Chicago ed., 1971) ("Judicial Decisions [have their] Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is . . . .").

In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," i.e., that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, *Commentaries* *258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose deci-

sions would be then regulated only by their own opinions . . . ." *Id.* at *259.

The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it.[10] Hamilton, like Blackstone, recognized that a court "pronounces the law" arising upon the facts of each case.[11] *The Federalist No. 81,* at 531 (Alexander Hamilton) (Modern Library ed., 1938). He explained the law-declaring concept of judicial power in the term, "jurisdiction": "This word is composed of JUS and DICTIO, *juris dictio,* or a speaking and pronouncing of the law," *id.,* and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role of juries. *Id.* Like Blackstone, he thought that "[t]he courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. *The Federalist No. 78* 507-08. Like Black-

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[10]See Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in *The Mind of the Founder: Sources of the Political Thought of James Madison* 390, 390-93 (Marvin Meyers ed., rev. ed. 1981) (describing the "authoritative force" of "judicial precedents" as stemming from the "obligations arising from judicial expositions of the law on succeeding judges . . . ."); James Wilson, II *The Works of James Wilson* 502 (1967) ("judicial decisions are the principal and most authentick" proof of what the law is and . . . "every prudent and cautious judge will appreciate them [because] . . . his duty and his business is not to make the law, but to interpret and apply it." *Id.* See also Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* 74 (1986); David M. O.Brien, *Constitutional Law and Politics* 73 (1995).

[11]James Wilson agreed: "judicium is quasi juris dictum . . . a judgment is a declaration of the law." II *The Works of James Wilson* 524 (1967).

stone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power. *Id.* at 508. Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ." *Id.* at 510.[12]

The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases. Hamilton anticipated that the record of federal precedents "must unavoidably swell to a very considerable bulk. . . ." *Id.* But precedents were not to be recorded for their own sake. He expected judges to give them "long and laborious study" and to have a "competent knowledge of them." *Id.* Likewise, Madison recognized "the obligation arising from judicial expositions of the law on succeeding judges." Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in *The Mind of the Founder: Sources of the Political*

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[12]Other early authorities confirm the connection between the doctrine of precedent and the separation of powers. See 1 *Kent's Commentaries*, Lect. XXI at 479: "Those nations, which have adopted the civil law as the main foundation of their own [recognize precedent to a far less degree than our own] . . . . With them the necessity of judiciary independence upon the executive, is not so clearly acknowledged. . . . It has been shown already that this independence requires, in a considerable degree, the acknowledgment of precedential authority."; William Cranch, Preface, 1 Cranch iii (1804): "In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge . . . perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public."

Thought of James Madison 390, 390-93 (Marvin Meyers ed., rev. ed. 1981). Madison expected that the accumulation of precedents would be beneficial: "[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents." Letter from James Madison to Samuel Johnson (June 21, 1789), in *12 Papers of James Madison* 250 (Robert A. Rutland et al. eds., 1977). Although they drew different conclusions from the fact, the Anti-Federalists also assumed that federal judicial decisions would become authorities in subsequent cases.[13] Finally, early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters in the years following the ratification of the Constitution. Grant Gilmore, *The Ages of American Law* 23 (1977); Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth-Century America* 28-32 (1997).

We do not mean to suggest that the Framers expected or intended the publication (in the sense of being printed in a book) of all opinions. For the Framers, limited publication of judicial decisions was the rule, and they never

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[13] See, *e.g.*, Essays of Brutus, XV (Mar. 20, 1788) in 2 *The Complete Anti-Federalist*, 441 (Herbert J. Storing ed., 1981): "one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them." By contrast, the danger in the Federal Farmer's view was that the federal courts had "no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion." Letters from The Federal Farmer No. 3 (Oct. 10, 1787), in 2 *The Complete Anti-Federalist* at 244.

drew that practice into question. Before the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800-1850,* 3 Am. J. Leg. Hist. 28, 34 (1959) (reviewing the history of American reports). As we have seen, however, the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. Although they lamented the problems associated with the lack of a reporting system and worked to assure more systematic reporting, judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum. Karsten, *Heart Versus Head* 30; Jesse Root, *The Origin of Government and Laws in Connecticut* (1798), reprinted in *The Legal Mind in American* 38-39 (Perry Miller ed., 1962).[14]

To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice

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[14]In this, they were following the common-law view, which considered entry on the official court record sufficient to give a decision precedential authority whether or not the decision was subsequently reported. See, *e.g.*, Coke, 2 *Institutes,* Proeme, last paragraph (stating that judicial decisions are reliable authority whether they are published, i.e., "related and reported in our Bookes," or only "extant in judicial Records. . . ."). This remained true even after reporting became more systematic. See James Ram, *Science of Legal Judgement* (1834) ("A manuscript note of a case is authority. It may be more full, or accurate, than a printed report of the same case. The existence of such manuscript may be little known. When cited by a party in a cause . . . it may be 'an authority precisely applicable' (18 Ves. 347); but the opposite party, or the Court, may never have heard of it before; it may then come as a great surprise upon both.").

(despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III. No less an authority than Justice (Professor) Joseph Story is in accord. See his *Commentaries on the Constitution of the United States* §§377-78 (1833):

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
>
> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to

tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

III.

Before concluding, we wish to indicate what this case is not about. It is not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general. Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision. The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. We point out, in addition, that "unpublished" in this context has never meant "secret." So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled "published" or not, available to anyone on line. This is true of our Court.

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system

is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not *fiat*.

Finally, lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

IV.

For these reasons, we must reject Ms. Anastasoff's argument that, under 8th Cir. R. 28A(i), we may ignore our prior decision in *Christie*. Federal courts, in adopting rules, are not free to extend the judicial power of the United States described in Article III of the Constitution. *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992). The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts "have always required a departure from precedent to be supported by some 'special justification.' " *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996), quoting *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring). Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.

Ms. Anastasoff's interpretation of §7502 was directly addressed and rejected in *Christie*.[15] Eighth Cir. R.

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[15]On July 28, 2000, the Second Circuit decided *Weisbart v. United States Dep't of Treasury*, 2000 WL 1041231 (2d Cir. July 28, 2000). *Weisbart* appears to conflict with *Christie*. We express no view on whether we would follow *Weisbart* if it were not for the conclusive effect of *Christie*.

28A(i) does not free us from our obligation to follow that decision. Accordingly, we affirm the judgment of the District Court.

HEANEY, Circuit Judge, Concurring.

I agree fully with Judge Arnold's opinion. He has done the public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished opinions. I write separately only to state that in my view, this is a case which should be heard en banc in order to reconsider our holding in *Christie*, and thus resolve an important issue.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX BB

RULE 28(c) OF THE CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Circiut Rule 28

Briefs

* * * *

(c) **Citation to Unpublished Disposition.** Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, are not to be cited as precedent. The same rule applies to unpublished dispositions of district courts, and to unpublished dispositions of other courts of appeals if those appellate courts have a rule similar to this one. Counsel may refer to an unpublished disposition, however, when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant. In that event, counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited therein. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

APPENDIX CC

[Filed Oct 15 1999]

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit
September Term, 1999

No. 98-1467

Beehive Telephone Company, Inc. and
Beehive Telephone Co. Inc. Nevada,

Petitioners

v.

Federal Communications Commission and
United States of America,

Respondents

AT&T Corporation,

Intervenor

BEFORE: Wald, Silberman and Randolph, *Circuit Judges*

ORDER

Upon consideration of the briefs and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purpose of Rule 34(j) of the General Rules of this Court and also meets one or more of the criteria set forth in that Rule, it is

ORDERED, by the Court, that the above case will be considered and decided without oral argument.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Cheri Carter
Cheri Carter
Deputy Clerk

APPENDIX DD

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 98-5098

EDWARD ISLEY,

Appellant,

v.

EXECUTIVE OFFICE FOR THE UNITED STATES ATTORNEYS, DEPARTMENT OF JUSTICE and FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE,

Appellees.

Oct. 21, 1999

Appeal from the United States District Court for the District of Columbia (No. 96cv00123).

Before WALD, HENDERSON and RANDOLPH, Circuit Judges.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia, the briefs filed by the parties, and oral argument held on September 15, 1999. The Court has determined that the issues presented occasion no need for a published

opinion. See D.C.Cir. R. 36(b). For the reasons stated in the accompanying Memorandum, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court is affirmed in part and remanded in part as set out in the Memorandum.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely-filed petition for rehearing. See D.C. Cir. Rule 41(a).

MEMORANDUM

On June 2, 1994, Edward Isley ("appellant") submitted a Freedom of Information Act ("FOIA") request to the Executive Officer for United States Attorneys ("EOUSA") seeking documents relating to a 1984 criminal trial in the United States District Court for the Eastern District of Virginia in which appellant was convicted for conspiracy to commit the murder of a fellow inmate at the Lorton Reformatory in Lorton, Virginia. On July 18, 1995, the EOUSA notified appellant that his request had been processed, and released six pages of documents, two of which were redacted. The EOUSA withheld 389 pages in their entirety and advised appellant that FOIA exemptions 3, 5, 6, 7(C), 7(D), and 7(F), as well as section 552(j)(2) of the Privacy Act had been applied to all or part of the withheld material. The EOUSA also referred appellant's request and 12 pages of documents that had originated with the Federal Bureau of Investigation ("FBI") to the FBI for processing. On November 6, 1995, appellant submitted a FOIA request directly to the FBI seeking information regarding third parties without mentioning them by name. On February 20, 1997, the FBI notified appellant that it had identified 215 pages of records it deemed rele-

vant and that it was releasing 180 of the pages to appellant. All 12 pages referred from the EOUSA as well as 31 other pages originating with the FBI were withheld in their entirety, and redactions were made to the documents that were released. pursuant to FOIA exemptions 6, 7(C) and 7(D).

On January 26, 1996, appellant filed suit in the United States District Court for the District of Columbia seeking an order compelling the EOUSA and the FBI to provide him with relevant withheld documents. Both the EOUSA and the FBI filed motions for summary judgment. On March 27, 1997, the district court granted partial summary judgment to the EOUSA only, holding that the EOUSA was justified in withholding documents pursuant to FOIA exemptions 5, 6, 7(C), 7(D) and 7(F). However, the district court concluded that the EOUSA had not sustained its burden of showing that it was entitled to withhold documents under exemption 3 and ordered the EOUSA to either provide additional justification for its action or release information withheld under exemption 3 alone. After supplemental briefing, the district court on June 11 issued an order granting the EOUSA's motion for summary judgment in full, stating that it was a final order from which appellant had 60 days to appeal.

On April 7, 1997, appellant filed a notice of appeal of the district court's order granting the EOUSA partial summary judgment, and this court issued an order to show cause why the appeal should not be dismissed as premature in light of the fact that the district court had not decided whether the EOUSA properly invoked exemption 3. Appellant subsequently filed a notice of appeal of the district court's order granting summary judgment to the EOUSA in full and moved this court to

dismiss his April notice of appeal and replace it with his July 1, 1997 notice. On August 25, 1997, appellant moved to dismiss the July 1 notice of appeal until the district court ruled upon appellant's FOIA complaint against the FBI or in the alternative stay the appeal pending the outcome of the FBI complaint. On September 8, 1997, this court obliged both of appellant's requests to dismiss, by dismissing both the April and July notices of appeal.

On February 20, 1998, the district court granted the FBI's motion for summary judgment, holding that the FBI made a sufficient showing to warrant summary judgment on FOIA exemptions 6, 7(C) and 7(D). On March 23, 1998, appellant filed a notice of appeal from the order of the district court granting the FBI's motion for summary judgment. The March 23 notice of appeal did not make any reference to the orders of the district court granting summary judgment to the EOUSA.

A.
Whether the District Court's Orders Concerning the EOUSA Are Included in the Appeal.

Despite the government's argument that appellant's notice of appeal does not encompass the judgment against the EOUSA and so we cannot consider that part of the trial court's judgment, we find that this appeal does encompass the order granting summary judgment to the FBI as well as the orders in favor of the EOUSA. A notice of appeal which is technically defective due to an error in designating the judgment appealed from should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from appellants' submissions, and appellees were not prejudiced by the notice of appeal. See South-

western Bell Telephone Co. v. FCC, 180 F.3d 307, 313 (D.C. Cir. 1999) (citing Brookens v. White, 795 F.2d 178, 180 (D.C. Cir. 1986)); Fed. R. App. P. 3(c)(4) (1999) ("an appeal must not be dismissed for informality of form ot title of the notice of appeal").

The Supreme Court has held that although a notice of appeal of a district court order dismissing a case while motions to vacate and amend pleadings were pending, was premature, a subsequent notice of appeal which mentioned only the motion to vacate, still constituted "an effective, although inept, attempt to appeal from the judgment sought to be vacated." Foman v. Davis, 371 U.S. 178, 181 (1962). This case is virtually identical to Foman. As in Foman, appellant here filed two notices of appeal which respectively stated that he was appealing the orders of the district court which granted summary judgment to the EOUSA. See Foman, 371 U.S. at 179. We dismissed the notices of appeal as premature in light of the fact that the district court had not yet ruled on the claims against the FBI. Yet, the premature notices of appeal read in conjunction with this appeal from the judgment against the FBI, evidence a clear intent to appeal from both the order granting summary judgment to the FBI and the earlier orders granting summary judgment to the EOUSA. Therefore, as the Supreme Court did in Foman, we treat the later notice of appeal at issue as an "effective, although inept, attempt to appeal" from all three orders of the district court.

Appellant's motion for appointment of counsel filed three weeks before the docketing statement also manifests an intent to appeal the district court's decisions to grant summary judgment to the EOUSA. Appellant states in that motion that he "is appealing two decisions pertaining to his FOIA civil complaint . . . derive[d] from the district court granting the FBI and

EOUSA summary judgment." Appellees were served with copies of this motion.

The Supreme Court has held that it is the notice afforded by a document alone which determines the document's sufficiency to give notice of appeal. See Smith v. Barry, 502 U.S. 244, 248 (1992). In Brookens, this court declared that an intent can be inferred from appellant's submissions and looked beyond the notice of appeal to the filed docketing statement before concluding that there was no intent to appeal an order. See 795 F.2d at 180-81; see also Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension Plan, 835 F.2d 881, 889 (D.C. Cir. 1987) (holding appellant's Rule 10(b)(1)(B) certificate to the court stating that no transcript would be ordered was sufficient as a notice of appeal because it plainly revealed an intent to appeal the order at issue). In this case, the motion for appointment of counsel, like the docketing statement in Brookens, gave effective notice of appeal.

Finally, appellees were not prejudiced by appellant's defective notice of appeal. Appellee EOUSA asserts that had it known that appellant intended to appeal the EOUSA orders, the EOUSA would have been better able to defend the district court's judgment in its favor at the summary affirmance stage. First, EOUSA was put on sufficient notice to avoid prejudice at that stage under Foman by appellant's previous notices of appeal of the EOUSA orders. See 371 U.S. at 181. Second, appellant's motion for appointment of counsel was filed one month before the motion for summary affirmance was filed and was served on the EOUSA, and appellees' certificate of counsel lists EOUSA as a party. In toto, appellant's filings are sufficient to maintain an appeal

of the orders granting summary judgment to the EOUSA as well as the FBI.

B.
Appellees' Claims of FOIA Exemption

This court reviews orders granting summary judgment de novo. See Computer Prof'ls for Soc. Responsibility v. United States Secret Serv., 72 F.3d 897, 902 (D.C. Cir. 1996). In a FOIA case, the agency must sustain its burden of demonstrating that the documents requested are exempt from disclosure under the FOIA. See id. (citing Gallant v. NLRB, 26 F.3d 168, 171 (D.C. Cir. 1994)); 5 U.S.C. §552(a)(4)(B) (1994).

1. Allegation that Prior Publication of Documents and Information Precludes Withholding Documents.

We first address the exemption claimed by the government under 7(C) since that exemption was invoked by both the EOUSA and the FBI for every piece of information withheld from appellant. In addition, we address the claims of exemption under 7(D), upon which the agencies also substantially relied to withhold information. Since exemptions 7(C) and 7(D) are themselves sufficient to cover all of the documents withheld, we need not address the validity of any other exemptions.

Exemption 7(C) permits an agency to withhold a document only if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C). Appellant claims that the documents at issue are already in the "public domain" because in response to a 1986 FOIA request he received many of them and he proffers a receipt of the documents obtained from the EOUSA at that time. He

also refers to Bailey, Allison and Richardson's testimony at appellant's trial which he says waived the government's right to withhold specific information about matters as to which they testified. However, this court has already noted that the status of the "public domain" doctrine has been changed, if not eradicated,[1] by the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). See Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992). As the public domain doctrine stands today, a party can only gain access to information withheld by the government under a FOIA exemption if it can "point to 'specific' information identical to that being withheld" that is publicly available. Davis, 968 F.2d at 1280.

As far as the documents received from the prior FOIA request are concerned, appellant has not demonstrated that those documents continue to be "freely available" in any "permanent public record." Presumably they are not since appellant is invoking FOIA to obtain them. But, more importantly, appellant has not shown that the documents from the 1986 FOIA request have ever been replicated in public documents or in any other "permanent public record" which would indicate that they are freely available. See Davis, 968 F.2d at 1280. In Reporters Committee, the Court held that the privacy interest in maintaining the "practical obscurity" of documents which have at one time been

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[1]Specifically, this court noted that the Supreme Court rejected the proposition that simply because material has been made public at one time, it should be thought permanently in the public domain, even though it has since become "practically obscure." See Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (citing Reporters Committee, 489 U.S. at 762-71).

disclosed, outweighs the FOIA-based public value of additional disclousre. See 489 U.S. at 779.

Nor does the testimony of Allison, Bailey and Richardson at trial place all documents relating to their testimony in the public domain. Rather, under Davis, the fact that they testified only bars the government from withholding the testimony itself. See 968 F.2d at 180. Since appellant has not requested the trial testimony of Allison, Bailey and Richardson nor has he otherwise pointed to specific information, identical to that being withheld, which is freely available, his claim that the government is barred from invoking exemption 7(C) to withhold documents pertaining to the subject matter of that testimony fails.

2. Claims Under Exemptions 7(C) and 7(D)

Of course, the inquiry does not end here. Even if appellant cannot show that FOIA exemptions are inapplicable under the public domain doctrine, the government has the burden to show that the documents withheld fall within an exemption. The affidavits submitted by the EOUSA and the FBI state that the purpose behind exemption 7(C) was to protect the privacy interests in the names and other personal information of special agents, government employees, local law enforcement officials, witnesses and other third-party individuals in the case. This court has recognized that interviewees, witnesses and investigators have a substantial privacy interest against harassment, embarrassment or damage to their reputations from being associated with criminal activity. See Computer Prof'ls, 72 F.3d at 904 (D.C. Cir. 1996) (citing McDonnell v. United States, 4 F.3d 1227, 1255 (3d Cir. 1993)); Nation Magazine v. United States Customs Serv., 71 F.3d 885, 896 (D.C. Cir. 1995);

Dunkelberger v. United States Dep't of Justice, 906 F.2d 779, 781 (D.C. Cir. 1990).

The other FOIA exemption upon which the EOUSA and the FBI principally rely is 7(D).[2] Exemption 7(D) exempts records or information compiled by a criminal law enforcement authority in the course of a criminal investigation so long as it is "information furnished by a confidential source." 5 U.S.C. §552(b)(7)(D). A source is usually deemed confidential on a case-by-case basis according to whether the source furnished information with the understanding that the communication would not be divulged except as necessary for law enforcement purposes. See United States Dep't of Justice v. Landano, 508 U.S. 165, 172, 174 (1993). However,

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[2]The EOUSA relied on exemption 7(D) in withholding a signed, sworn and witnessed handwritten statement by a third party with information regarding the murder; a letter from the prosecutor to the parole board dated 9/26/84 regarding third party's cooperation with prosecutors; a 9/27/84 letter from prosecutor to parole board providing personal information omitted from 9/26/84 letter; handwritten notes of the prosecutor of statements made by third parties regarding the terms and conditions of confinement; handwritten notes of the prosecutor in preparation for use in direct questioning of third parties regarding investigation of murder; handwritten notes of the prosecutor regarding personal information of third parties and information obtained in murder investigations; and handwritten notes of prosecutor made in preparation for use at murder trial and containing mental impressions from direct and cross-examinations of third parties. All of these documents were withheld in full. The documents withheld by the FBI under exemption 7(D) are interviews by the FBI of inmates and witnesses to the murder at the Lorton Reformatory where Isley was an inmate, and six pages of information provided by local law enforcement officers which were compiled by Lorton Reformatory staff as part of its initial investigation into the murder and given to the FBI as part of a cooperative effort.

depending on the character of the crime at issue and the source's relation to the crime, there are other narrowly defined circumstances that will also support an inference of confidentiality. See id. at 179.

The affidavits submitted by the EOUSA and the FBI both state that although there was no express agreement of confidentiality in this case, the nature of the crime – a murder and conspiracy among prisoners – and the relation of the sources to the crime – fellow prisoners and prison officials – support an inference of confidentiality in this case. The district court held that these factors constituted "generic circumstances in which an implied assurance of confidentiality fairly can be inferred." Landano, 508 U.S. at 179.

The district court was correct. The Supreme Court in Landano itself used as an example of a circumstance which would warrant an inference of confidentiality the risk of reprisal when a source inside a prison gives information about a crime by another person in the prison. See 508 U.S. at 180. (citing Parton v. United States Dep't of Justice, 727 F.2d 774, 776-77 (8th Cir. 1984) (prison officials who provided information about alleged attack on inmate faced "high probability of reprisal")); see id. (citing Nix v. United States, 572 F.2d 998, 1003-04 (4th Cir. 1978) (guards and prison inmates who informed on guards who allegedly beat another inmate supported a finding of implied assurance of confidentiality)). Therefore, under Landano this case presents one of the "narrowly defined circumstances" where an inference of confidentiality is appropriate.

3. Allegation That Agencies May Not Withhold Information Under Exemption 7(C) Because Appellant Has Submitted Compelling Evidence of Prosecutorial Misconduct

Finally, appellant asserts that the district court erred in concluding that FOIA exemption 7(C) applies because appellant has shown strong evidence of prosecutorial misconduct. But allegations of government misconduct are not enough unless the requesting party sets forth "'compelling evidence that the agency denying the FOIA request is engaged in illegal activity' and shows that the information sought is 'necessary to confirm or refute that activity.'" See Davis, 968 F.2d at 1282 (quoting SafeCard Servs. Inc. v. SEC, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991)). Appellant submitted excerpts from the prosecutor's closing argument stating that Allison and Bailey were not offered any inducements to testify as well as letters from the prosecutor written weeks after the trial recommending Allison and Bailey to the D.C. Parole Board. Appellant asserts that this evidence constitutes compelling evidence that the EOUSA has engaged in the illegal activity of concealing from the jury inducements provided to important witnesses in violation of Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972).

The requirement that appellant set forth compelling evidence that an agency has engaged in illegality is a stringent one. In fact, this court has never found that a requesting party has presented sufficient evidence to satisfy the compelling evidence standard. See, e.g., Spirko v. United States Postal Service, 147 F.3d 992, 999 (D.C. Cir. 1998) (allegations and evidence submitted that Postal Service withheld exculpatory evidence at trial); Quinon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996)

(allegations that judge engaged in obstruction of justice in investigation); Computer Prof'ls, 72 F.3d at 904 (allegations that Secret Service illegally broke up meeting); McCutchen v. United States Dep't of Health and Human Servs., 30 F.3d 183, 189 (D.C. Cir. 1994) (appellant submitted newspaper articles asserting that the Office of Scientific Integrity was mishandling scientific misconduct investigations).

None of the actions by the prosecutor here compel a conclusion that there was an agreement with Bailey or Allison to make a recommendation for leniency to the parole board in exchange for their testimony. First, the prosecutor's letter written after trial to the parole board asked for an early release for Allison precisely because Allison cooperated "without an agreement for anything in return"; this refutes appellant's assertion that there was an agreement beforehand and is consistent with the prosecutor's representation at trial that Allison had, at that point, received nothing in return for his cooperation. Second, although the prosecutor's post-trial letter to the parole board recommending that it take Bailey's cooperation into account in determining a parole eligibility date may be technically inconsistent with the prosecutor's statements at trial that Bailey is "not going on work release any earlier than if he had not testified" and with the government's statement in an earlier parole board letter that it would not recommend time cuts, the letter post-trial does not contradict the prosecutor's main thrust in his statement to the jury that "Bailey . . . told the FBI about this murder before [he] got promises from the Government." And despite any inconsistency, the subsequent parole board letter gives no indication that the prosecutor's recommendation was part of a pretrial agreement with Bailey. In essence, the fact that the prosecutor chose to reward Bailey

after trial for his contributions to a successful prosecution, standing alone, is not compelling evidence of an agreement beforehand to do so. The evidence of misconduct submitted in this case is in the end no more reliable than the newspaper articles submitted in McCutchen, which reported that the Office of Scientific Integrity was mishandling investigations into scientific misconduct. See 30 F.3d at 189. Both submissions lack direct evidence which would convincingly show some act of misconduct by an agency.

4. Appellant's Claim That Segregable Information Was Not Released

The district court did err in not making a finding regarding the segregability of the documents withheld by the EOUSA and the FBI. FOIA dictates that "any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. §552(b). The segregability requirement applies to all documents and all exemptions in the FOIA. Krikorian v. Department of State, 984 F.2d 461, 466 (D.C. Cir. 1993). Although appellant concedes that it did not raise the issue of segregability in the court below, and appellee claims appellant did not even raise the issue properly before us, this court has concluded that segregability must be addressed regardless of whether a party raises it. See Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022, 1028 (D.C. Cir. Jun. 1, 1999); Public Citizen Health Research Group v. FDA, 185 F.3d 898, 907 (D.C. Cir. 1999). In any event, we find appellant did allege in his brief in our court that appellees failed to properly segregate portions of documents that were not covered under FOIA exemptions from exempted material. Therefore, this case must be

remanded to the district court to determine if there is information in the documents withheld which can be segregated and disclosed to appellant.

C. The Reasonableness of the Agency's Search

On appeal, appellant raises for the first time the issue whether a genuine issue of material fact exists regarding the reasonableness of the search conducted by the EOUSA and the FBI. Because the matter was never presented to the district court, appellant is barred in this case from pursuing the matter on appeal. See Felch v. Air Florida, Inc., 866 F.2d 1521, 1525 (D.C. Cir. 1989).

CONCLUSION

For the foregoing reasons, we hold that the orders granting summary judgment in favor of the EOUSA and the FBI are encompassed in this appeal. Further, we affirm the decision of the district court that the EOUSA and the FBI properly invoked FOIA exemptions 7(C) and 7(D). However, since the district court did not make determine whether any unprotected information is segregable from protected information in the documents withheld, we remand to the district court, for such a finding.